85-400 (1)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1984

THE STATE OF FLORIDA

Petitioner,

vs.

PEDRO ROMERO a/k/a
GIOVANNI MASCARA,

Respondent.

On Petition for a Writ of
Certiorari to the Florida District
Court of Appeal

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED FOR REVIEW

DOES EDWARDS V. ARIZONA, 451 U.S. 477 (1981) AND THE SIXTH AMENDMENT MANDATE SUPPRESSION OF POST-ARREST ORAL AND SIGNED RECORDED STATEMENTS OBTAINED AFTER MIRANDA WARNINGS WHERE COUNSEL, NOT THE DEFENDANT, INVOKED DEFENDANT'S SIXTH AMENDMENT RIGHTS AND THE DEFENDANT ABSENT A REQUEST FOR COUNSEL, AFFIRMATIVELY WAIVES HIS FIFTH AMENDMENT RIGHTS AND MAKES STATEMENTS WITHOUT COUNSEL BEING NOTIFIED OR PRESENT?

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District affirming the trial court's granting of the Respondent's Motion to Suppress Statements is reported at State v. Romero, 471 So.2d 110 (Fla. 3d DCA 1985) reh. den. __So.2d __ (Fla. 3d DCA July 8, 1985). The trial court's Order Granting Motion To Suppress Statements dated October 9, 1984 is found at A1-A6.

JURISDICTION

The jurisdiction of this court is invoked pursuant to provisions of Title 28, United States Code §1257(3).

CONSTITUTION AND STATUTORY PROVISIONS

Sixth Amendment of the Constitution of the United States.

ARTICLE [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

Respondent was charged with the first degree murders of Olmeda Mena and Jorge Rodriquez pursuant to arrest warrants issued October 9, 1980. On January 19, 1984 Respondent was arrested.

On January 20, 1984 the Respondent appeared before the Honorable Meck Robinette for a first appearance and bond hearing. At said hearing the Public Defender undertook the representation of the defendant and invoked the defendant's right to counsel. The Assistant State Attorney who was present at the hearing acknowledged that the right to counsel had been invoked, and further indicated that city law enforcement would seek defense counsel prior to speaking with Mr. Romero.

Subsequent to said bond hearing another Assistant State Attorney was assigned the case. He proceeded to instruct Detective Roberson to go to the jail, read Romero his rights and see if Romero would speak to the Detective. Said request was made without knowledge of the events occurring on January 20, 1984, however, the new Assistant State Attorney was aware the Public Defender had been appointed to represent Romero.

On January 30, 1984 Detective Roberson, accompanied by Detective Marva Preston proceeded to the Dade County Jail for the purpose of interviewing the defendant. Roberson did not know whether an attorney had been appointed for Romero, had not been informed that Romero did not wish to speak to them or advised

not to contact the Romero without his attorney being present. Romero was brought to the interview room in the Dade County Jail where Roberson identified himself and Detective Preston as police officers. Roberson told Romero he was the investigator responsible for his being in jail and charged with two homicides and that he would like to talk to Romero about the two cases. Before he did, Roberson explained that he must advise Romero of his rights. Romero did not indicate he was unwilling to speak without his attorney being present nor did he inquire as to whether the officers had contacted his lawyer. The standard Miranda warning form was read and explained to Romero. Romero acknowledged that he understood those rights. He initialed each of the warnings

including the provision that he did not want an attorney, and then agreed to talk to the officers about his involvement in the two homicides for twenty to thirty minutes. Romero was then advised that the officers would like to check him out of the jail and obtain a formal statement before a stenographer. He agreed and was then taken to the Miami Police Department where he was again advised of his rights, and he again signed and dated a form acknowledging he understood. For the third time, prior to a formal statement, the defendant was read, had explained and signed a form indicating he understood his rights. If Romero indicated he did not understand something in English, the steno placed an asterick at that point and it was explained to the defendant in Spanish by

an interpreter. Romero signed the formal statements. He never stated he wanted an attorney or that he did not wish to speak to the officers, or did he ask to call his attorney.

Romero made two formal statements after affirmatively waiving his Miranda rights.

Indictments for two first degree murder charges were returned February 8, 1984. On February 9, 1984 he appeared for arraignment and was appointed the public defender. A plea of not guilty was entered.

On September 4, 1984, Romero filed a motion to suppress his admissions, confession and statements. He alleged said

statements were obtained in violation of his right to counsel and privilege against self incrimination as guaranteed by the Fifth and Sixth Amendments to the United States Constitution and Article I, Section 16 of the Florida Constitution. He also alleged that the statement were not fully and voluntarily given, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 9, Florida Constitution. A hearing was held October 1, 1984 on said motion at which time the trial court granted the motion to suppress.

On October 9, 1984 the trial court entered its written order suppressing oral and written statements finding:

A. Mr. Romero was appointed counsel at the hearing on January 20, 1984. Whether or not this appointment was improvident, it was in fact, appointment of counsel pursuant to Florida Rule of Criminal Procedure 3.111 and the Constitution of the State of Florida, Article I, §16.

B. Whether the appointment of counsel was improvident or not, the State Attorney's Office, through the Assistant State Attorney present, acknowledged the appointment of counsel and acknowledged the invocation of Mr. Romero's rights by the Assistant Public Defender.

C. The acknowledgement by the Assistant State Attorney of Mr. Romero's appointment of counsel and the invocation of rights by that counsel is a fact which makes this case different than other cases which have held that Mr. Romero's right to counsel would not have attached until a formal adversary proceedings began.

D. Mr. Romero's Sixth Amendment Right to counsel attached at the January 20, 1984 hearing and that Mr. Romero's rights to such counsel, pursuant to the Sixth Amendment were invoked on his behalf at that hearing.

E. The subsequent approach of Mr. Romero by the City of Miami Police, subsequent waiver of his rights and taking of a statement was violative of his right to be represented by counsel, pursuant to the Sixth Amendment to the Constitution of

the United States, as well as Florida Rule of Criminal Procedure 3.111 and Article I, §16 of the Florida Constitution.

The State of Florida immediately appealed and in May 28, 1985, the Disctrict affirmed the granting of the Motion to Suppress on the authority of Edwards v. Arizona, 451 U.S. 477, (1981) in State v. Romero, 471 So.2d 11o (Fla. 3d DCA 1985).

REASONS FOR GRANTING THE WRIT

The indiscriminate application of Edwards v. Arizona, 451 U.S. 477 (1981) to Fifth and Sixth Amendment cases typifies the baffling impact this decision has had on both state and federal cases. Although specifically limited to Fifth

Amendment claims,[1] courts have insisted on an expansive application of Edwards, to Sixth Amendment claims in an effort to correct all discernable wrongs. Indeed this court has accepted review in Michigan v. Jackson, and Michigan v. Bladel, 37 Cr.L. 4071, the very issue heretofore unresolved by Edwards,

> Are interests protected by Sixth and Fifth Amendment rights to counsel sufficiently similar such that knowing and intelligent waiver of Fifth Amendment "standard Miranda right" also contitute knowing and intelligent waiver of defendant's then existing Sixth Amendment rights?

The instant case is similarly situated to Michigan v. Jackson, and

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[1] Edwards v. Arizona, 451 U.S. at 480 footnote 7.

Michigan v. Bladel, supra. The trial court concluded herein, that whether counsel had been improvidently granted to Romero, his Sixth Amendment right to counsel attached January 20, 1984, when counsel invoked said right in Romero's behalf.

The court found the subsequent approach of Romero, by police officers on January 30, 1984, and "subsequent waiver of rights and taking of a statement was wiolative of his (Romero's) right to be represented by counsel, pursuant to the Sixth Amendment to the Constitution...." (A-5._)

The District Court of Appeal of Florida, Third District in State v. Romero, 471 So.2d 110 (Fla. 3d DCA 1985) without

elaborating relied solely of Edwards v. Arizona, supra, to affirm the granting of the Motion to Suppress. Since Romero's Fifth Amendment rights were not at issue, the District Court erroneously expanded its reading of Edwards to the instant case. This is especially important because this case merely exhibits the tip of the iceberg of cases both state and federal where courts have struggled to distinquish between the concerns underlying the Fifth and Sixth Amendment rights to counsel.

Romero never personally invoked his Sixth Amendment right to have counsel present at the pre-arraignment January 30, 1985, meeting with the police. In fact Romero acknowledged his Miranda rights more than once and executed a waiver of rights form. He spoke with

police freely and stated he was willing to speak with the police without counsel's presence.

The Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel protect different interests and have been subject to separate analysis. Rhode Island v. Innis, 446 U.S. 291 (1980); Edward v. Arizona, 451 U.S. at 480 N.7 (1981).

In Rhode Island v. Innis, supra, the court offered an explanation of the right to counsel discussed in Miranda v. Arizona, 384 U.S. 436 (1966):

> Our decision in Brewer rested solely on the Sixth and Fourteenth Amendment right to counsel.... That right, as we held in Massiah v. United States, prohibits law enforce-

> States, prohibits law enforcement officers from 'deliberately elicit[ing]' incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed. By contrast, the right counsel at issue in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and fourteenth Amendments as interpreted in the Miranda opinion. The definitions of ;interrogation; under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchange able since the policies underlying the two constitutional protections are quite distinct.
>
> 446 U.S. at 300, n.4, 100 S.Ct. 1689, 64 L.Ed.2d at 307, (citations omitted).

Counsel was required in Miranda "in order to protect the Fifth Amendment privilege against self- incrimination rather than to vindicate the Sixth Amendment right to counsel."

Edwards, relied on the holding in Miranda that:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."

The court also reiterated that Edwards applies "after the accused has expressed his desire to deal with the police only through counsel." Oregon v. Bradshaw, __ U.S., 103 S.Ct. 2830, 2834, 77 L.Ed. 405 (1983).[2]

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[2]A defendant's rights are personal to him and no one can invoke these on his behalf. In Commonwealth v. Carrie, 388 Mass. 776, 448 N.E. 2d 740 (1983), the defendant's attorney ordered the police to stop questioning his client, but the court declared that the right was not the attorney's to assert. In Fuentes v. Moran, 572 F. Supp. 1461 (D.C. R.I. 1983), the court citing to United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.ed. 141 (1976), among others, declared:

Since Romero could waive the presence of counsel already appointed and law enforcement officers are under no rule of law to notify counsel prior to questioning, it seems incongruous that a freely waived Fifth Amendment right to counsel cannot also serve as the basis for Sixth Amendment waiver Miranda v. Arizona, supra,

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Footnote Cont'd.

> "The sockdolager is simply this: petitioner rights against self incrimination is personal, it cannot be invoked or waived by anyone other than the person to whom the right attaches."

See also Doyle v. State, 460 So.2d 353, 356 (Fla. 1984) wherein the Florida Supreme opined:

> "Further appellants claim that he was denied access to an attorney during questioning is a personal one which must be invoked by the defendant in some unambiguous manner.

As previously noted this very issue awaits disposition in Michigan v. Bladel, supra. Whether a stricter standard needs to be announced for the waiver of a defendant's Sixth Amendment right truly begs the question, why require Miranda warnings?

A decision by this Court that the Sixth Amendment right to counsel is subsumed in Fifth Amendment warnings in either pre-or post-arraignment meeting between a defendant and the police mandates summary reversal in the instant case.

CONCLUSION

The trial court's conclusion that Romero's Sixth Amendment right to counsel was violated and the Third District

Court's reliance on Edwards v. Arizona, supra, to affirm the granting of motion to dismiss statements, erroneously expands the scope of Edwards v. Arizona, supra, requiring summary reversal.

Moreover, the underlying conflict as to whether a defendant's waiver of his Fifth Amendment right to counsel also waives his Sixth Amendment right to counsel is ripe for disposition in Michigan v. Bladel, supra. Resolution therein will directly impact the same question herein posited. Review should be accepted and the matter stayed pending the outcome in Michigan v. Bladel supra.[3]

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[3]See also Moran v. Burbine, certiorari review accepted 37 Cr.L. 4061, where the question presented is:

Respectfully submitted,

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Footnote Cont'd.

Does the Fifth Amendment's Self-incrimination Clause require suppresion of three confessions each made after proper Miranda warnings and three valid waiver of rights, solely because attorney unrequested by defendant was given misleading information by police officer that there would be no further interrogation of defendant that night and was not informed of attorney's call?

APPENDIX

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IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL
CIRCUIT, IN AND FOR
DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 80-19309

THE STATE OF FLORIDA,	:	
Plaintiff,	:	
vs.	:	ORDER GRANTING MOTION TO SUPPRESS STATEMENTS
PEDRO ROMERO, a/k/a GIOVANNI MASCARA,	:	
Defendant.	:	
_____	:	

THIS CAUSE came before this Court on the motion of the Defendant to suppress statements made to the City of Miami Police Department, and this Court having taken testimony, heard argument of counsel, been supplied with and read memorandums of law and the cases cited, and in all respects being fully apprised

of all circumstances, therefore finds that;

1. The Defendant, PEDRO ROMERO, was taken into custody pursuant to a warrant issued in Dade County, Florida.

2. The Defendant, PEDRO ROMERO, appeared before a county court judge at first appearance hearing on January 20, 1984.

3. At the first appearance hearing on January 20, 1984, PEDRO ROMERO was appointed the Public Defender to represent him.

4. At the January 20, 1984, hearing, an assistant Public Defender representing Mr. ROMERO invoked Mr. ROMERO'S right to counsel pursuant to the Sixth Amendment and as well invoked Mr. ROMERO'S Fifth Amendment rights.

5. These rights on behalf on Mr.

ROMERO were invoked orally in open court in the presence of an Assistant State Attorney.

6. The Assistant State Attorney representing the State Attorney for the 11th Judicial Circuit, acknowledged and accepted these rights and stated that:

> On counsel, city law enforcement will seek defense counsel prior to speaking with Mr. Romero.

7. On January 30, 1984, Mr. ROMERO was interviewed by officers of the City of Miami Police Department at the direction of a different Assistant State Attorney.

8. At the interview on January 30, 1984, Mr. ROMERO signed a waiver of rights form.

9. After waiving his rights per the rights waiver form, Mr. ROMERO gave the

statements which are the subject of this order to the City of Miami Police.

Based upon the above facts, it is the finding of this Court that:

A. Mr. ROMERO was appointed counsel at the hearing on January 20, 1984. wherther or not this appointment was improvident, it was in fact, appointment of counsel pursuant to Florida Rule of Criminal Procedure 3.111 and the Constitution of the State of Florida, Article I, §16.

B. Whether the appointment of counsel was improvident or not, the State Attorney's Office, through the Assistant State Attorney present, acknowledged the appointment of counsel and acknowledged the invocation of Mr. ROMERO'S right by the Assistant Public Defender.

C. The acknowledgement by the Assistant State Attorney of Mr. ROMERO'S

appointment of counsel and the invocation of rights by that counsel is a fact which makes this case different than other cases which have held that Mr. ROMERO'S rights to counsel would not have attached until a formal adversary proceedings began.

D. Mr. ROMERO'S Sixth Amendment Right to Counsel attached at the January 20, 1984 hearing and that Mr. ROMERO'S rights to such counsel, pursuant to the Sixth Amendment were invoked on his behalf at that hearing.

E. The subsequent approach of Mr. ROMERO by the City of Miami Police, subsequent waiver of his rights and taking of a statement was violative of his right to be represented by counsel, pursuant to the Sixth Amendment to the Constitution of the United States, as well as Florida Rule of Criminal Procedure 3.111 and

Article I, §16 of the Florida Constitution.

It is therefore, hereby

ORDERED AND ADJUDGED that the oral and written statements given by PEDRO ROMERO to the City of Miami Police Department as a result of the interrogation on January 30, 1984 are hereby suppressed and excluded as evidence in this cause.

DONE AND ORDERED in Miami, Dade County, Florida this 9th day of October, 1984.

EDWARD COWART
CIRCUIT COURT JUDGE

Copies Furnished To:

Michael L. Von Zamft, Esq.
Flora Seff, Asst. State Attorney

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1985

THE STATE OF FLORIDA, **

Appellant, **

vs. **CASE NO. 84-2284

PEDRO ROMERO, a/k/a **
GIOVANNI MASCARA, a/k/a
JIMMY, **

**

Opinion filed May 28, 1985.

An Appeal from the Circuit Court for Dade County, Edward Cowart, Judge.

Jim Smith, Attorney General, and Henry R. Barksdale, Assistant Attorney General, of appellant.

Michael Von Zamft and Claire Tacher, for appellee.

Before SCHWARTZ, C.J., and HENDRY and DANIEL S. PEARSON, JJ.

PER CURIAM.

Affirmed. Edwards v. Arizona, 451 U.S. 477, 484, 101 S.Ct. 1880, 1884, 68 L.Ed. 2d 378,386 (1981).

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D.1985

MONDAY, JULY 8, 1985

THE STATE OF FLORIDA, :

Appellant, :

vs. : CASE NO. 84-2284

PEDRO ROMERO, a/k/a GIOVANNI MASCARA, a/k/a JIMMY, :

Appellee. :

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

by_____
Deputy Clerk

cc: Jim Smith and Henry Barksdale
Michael Von Zamft

/hb